2017 IL App (1st) 143269-U

No. 1-14-3269

Order filed June 29, 2017

Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 08 CR 16453
	)	
ADRIAN GOMEZ,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's summary dismissal of defendant's postconviction petition over his contention that his sentence was unconstitutional under the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois constitution, and defendant's claims that he was denied his right to the effective assistance of postconviction counsel and denied his right of meaningful access to the courts.

¶ 2 Defendant, Adrian Gomez, appeals from an order of the circuit court of Cook County summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725

ILSC 5/122-1 *et seq.* (West 2010)). On appeal, he abandons the arguments made in his petition and contends that his 48-year sentence is unconstitutional under the Eighth Amendment to the United States Constitution and the Proportionate Penalties Clause of the Illinois constitution. He further contends that his postconviction counsel provided unreasonable assistance by failing to raise a claim in the postconviction petition that was cognizable under the Act, which also denied him meaningful access to the courts.

¶ 3 I. BACKGROUND

¶ 4 A. Trial

¶ 5 A full recitation of the facts can be found in this court's order on defendant's direct appeal. *People v. Gomez*, 2012 IL App (1st) 102195-U. As pertinent here, the record shows that defendant was charged with the murder of Juan Torres in a shooting that occurred on June 20, 2008. Defendant was 16 years old at the time of the shooting. Following the testimony of several witnesses and a Chicago Police Detective, the jury found defendant guilty of first degree murder and that he personally discharged a firearm during the commission of that offense.

¶ 6 After the trial, defendant's counsel withdrew and defendant retained new counsel to represent him. Defendant's new counsel filed a motion for a new trial alleging ineffective assistance of defendant's original trial counsel in failing to interview defendant about his version of the events, failing to properly prepare for the trial, and failing to raise a claim of self-defense. The court held a hearing on defendant's motion during which defendant's original trial counsel, defendant, and defendant's mother testified. Following the hearing, the court noted that defendant testified that he told his trial counsel he had no witnesses to present on his behalf and further found that defendant's trial counsel had performed adequately throughout trial. The court therefore denied defendant's motion for a new trial.

¶ 7 At defendant's sentencing hearing, the trial court stated that there were many factors it had to consider in determining defendant's sentence, including deterring others from committing this offense in the future. The court observed that defendant was "a young man. You were a teenager, a young teenager when this offense was committed." The court found, however, that based on the facts of the case, defendant responded to a fistfight by pulling out a weapon and taking a life. The court stated that it also considered defendant's lack of background, a single prior juvenile adjudication in 2007 for unlawful use of a weapon, and the facts surrounding the crime. The court noted that the minimum sentence in defendant's case was 45 years' imprisonment, and after considering all of the factors in aggravation and mitigation, sentenced him to a term of 48 years' imprisonment. On direct appeal, this court affirmed the circuit court's judgment over defendant's sole contention that the trial court erred in tendering the jury a second degree murder instruction.

¶ 8 B. Defendant's Postconviction Petition

¶ 9 On June 30, 2014, defendant filed, through counsel, the postconviction petition at bar. In his petition, defendant contended, *inter alia*, that his trial counsel was ineffective for failing to prepare him for trial and interview witnesses on behalf. In ruling on defendant's petition, the court dismissed the petition at the first stage of postconviction proceedings. The court found that it had considered the same claims of ineffective assistance in ruling on defendant's motion for a new trial. The court found that defendant's claims were therefore barred by *res judicata* and because defendant failed to raise any issue of trial counsel's ineffectiveness on direct appeal, the claims had also been waived. Defendant now appeals.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant abandons the arguments set forth in his petition and instead contends that his 48-year sentence violated the eighth amendment to the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 11). Defendant also contends that his postconviction counsel was ineffective for failing to raise claims in the petition that were cognizable under the Act.

¶ 12 A. The Post-Conviction Hearing Act

¶ 13 As an initial matter, we note that the Act provides a three-stage mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the first stage of proceedings, as here, defendant is required to set forth only the "gist" of a constitutional claim, and the circuit court may summarily dismiss the petition if it finds that the petition is frivolous or patently without merit, *i.e.*, that it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 9, 16 (2009). Section 122-2 of the Act specifically provides that "the petition shall *** clearly set forth the respect in which petitioner's constitutional rights were violated," and, section 122-3 provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended petition is waived" (725 ILCS 5/122-2 (West 2010); 725 ILCS 5/122-3 (West 2010)). *People v. Jones*, 213 Ill. 2d 498, 503-04 (2004). We review the summary dismissal of a postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 14 B. Forfeiture

¶ 15 Defendant concedes that he did not raise this issue in his postconviction petition, but argues that we may review his as-applied constitutional challenge for the first time on appeal. The supreme court recently considered this contention in the context of a defendant's petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILSC 5/2-1401 (West 2010)). *People v. Thompson*, 2015 IL 118151, ¶ 25. The supreme court determined that although facial challenges to statutes may be raised at any time, as-applied constitutional challenges are dependent on particular facts and circumstances of the individual defendant and it is therefore "paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." *Id.* ¶ 37. The court found that there was nothing in the record to support defendant's reliance on the "evolving science" of juvenile maturity and brain development and that the trial court would be the most appropriate forum to develop the evidence necessary to address defendant's claims. *Id.* ¶ 38. The court therefore found that defendant had forfeited his as-applied challenge to his sentence by raising it for the first time on appeal from the dismissal of his section 2-1401 petition. *Id.* ¶ 39.

¶ 16 In doing so, the supreme court rejected defendant's reliance on two appellate court cases, *People v. Luciano*, 2013 IL App (2d) 110792 and *People v. Morfin*, 2012 IL App (1st) 103568. *People v. Thompson*, 2015 IL 118151, ¶ 41-42. The supreme court noted that in contrast to Thompson, who was an adult, both *Luciano* and *Morfin* "involved defendants who were sentenced to mandatory natural life based on the commission of murders when they were minors under the age of 18. See *Luciano*, 2013 IL App (2d) 110792, ¶ 7 (defendant convicted of two counts of murder committed when he was 17 years old); *Morfin*, 2012 IL App (1st) 103568, ¶ 11 (defendant convicted under accountability theory of two counts of murder committed when he

was 17 years old)." *People v. Thompson*, 2015 IL 118151, ¶ 41. The court found that these decisions were consistent with its recent decision in *People v. Davis*, 2014 IL 115595 in which the court held that the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) announced a new substantive rule that applied retroactively to *minors* sentenced to a mandatory term of life imprisonment. (Emphasis in original). *People v. Thompson*, 2015 IL 118151, ¶ 42.

¶ 17 In the context of postconviction proceedings, one panel of the appellate court has found that "[w]hen considered as a whole, *Thompson* implies that courts must overlook forfeiture and review juveniles' as-applied eighth amendment challenges under *Miller*, notwithstanding the general rule prohibiting as-applied challenges raised for the first time on appeal." *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 35. We observe, however, that defendant in *Nieto*, unlike defendant in the case at bar, filed his *pro se* petition under the Act before the Supreme Court issued its decision in *Miller*. *Id.* ¶ 18. In order to determine whether defendant's claim is forfeited, we first must consider the Illinois and Supreme Court case law that has followed *Miller*.

¶ 18 1. *Miller and Its Progeny*

¶ 19 In contending that his sentence violated the eighth amendment and the Illinois constitution's proportionate penalties clause, defendant relies on the Supreme Court's decision in *Miller* and the subsequent cases from both the United States Supreme Court and the Illinois supreme court interpreting and applying *Miller*. In *Miller*, the Supreme Court held that mandatory life sentences for juveniles violate the eighth amendment's prohibition of cruel and unusual punishment. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2464.

¶ 20 The United States Supreme Court expanded on its decision in *Miller* in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016). In *Montgomery*, the Court determined that *Miller* should apply retroactively and state courts must apply *Miller* in collateral proceedings. *Id.* at ___, 136 S. Ct. at 732. The Court further fond that *Miller* did not prohibit all life sentences for juveniles, but reserved life sentences for "the rare juvenile offender whose crime reflects irreparable corruption." (Internal quotation marks omitted.) *Id.* at ___, 136 S. Ct. at 734. Throughout the decision, the court repeatedly stated that the decision in *Miller* applied only to juvenile offenders sentenced to "mandatory life without parole." *Id.* at ___, 136 S. Ct. at 726, 732, 733.

¶ 21 The Illinois supreme court had an opportunity to interpret *Miller* in *Davis*, 2014 IL 115595. In *Davis*, defendant filed a successive postconviction petition under the Act contending that his mandatory life sentence was unconstitutional. *Id.* ¶ 10. The supreme court determined that *Miller* applied retroactively and that "*Miller's* new substantive rule constitutes 'cause' [to satisfy the 'cause and prejudice' test for successive postconviction petitions] because it was not available earlier***" *Id.* ¶ 42. Although defendant in *Davis* was sentenced to a mandatory term of natural life imprisonment without parole as proscribed by the Supreme Court in *Miller*, following *Davis*, many panels of this appellate court were asked to consider whether terms of imprisonment that were sufficiently lengthy, but not terms of mandatory natural life imprisonment, could violate *Miller* where the sentences amounted to *de facto* life sentences. See, *e.g.*, *People v. Cavazos*, 2015 IL App (2d) 120171 (holding that a 17-year-old defendant's 75-year sentence was not *de facto* life sentence in violation *Miller*); but see, *e.g.*, *People v. Nieto*, 2016 IL App (1st) 121604 (holding that a 78-year sentence for a 17-year-old defendant was a *de facto* life sentence in violation of *Miller* and the eighth amendment); *People v. Gipson*, 2015 IL

App (1st) 122451 (holding that a juvenile defendant's 52-year sentence was a *de facto* life sentence in violation of *Miller*).

¶ 22 In *People v. Reyes*, 2016 IL 119271, our supreme court addressed the question of whether a *de facto* life sentence could be found unconstitutional under *Miller*. In *Reyes*, the supreme court held that a legislatively mandated term of imprisonment violates *Miller* and the eighth amendment where the sentence is so long that it "amounts to the functional equivalent of life." *Id.* ¶ 9. In *Reyes*, the 16-year-old defendant was sentenced to a term of imprisonment of 97 years, with the earliest opportunity for release after 89 years. *Id.* ¶ 10. The State conceded, and the supreme court agreed, that defendant would most likely not live long enough to ever become eligible for release. *Id.* Accordingly, the court vacated defendant's sentence as unconstitutional under *Miller* and remanded defendant's case for resentencing. *Id.* ¶¶ 10-11.

¶ 23 2. *Division in the Appellate Court*

¶ 24 Following *Reyes*, several panels of this appellate court have grappled with the issue of whether a juvenile defendant's sentence amounts to a *de facto* life sentence in violation of *Miller* where the term of imprisonment was sufficiently shorter than the term at issue in *Reyes*. *People v. Applewhite*, 2016 IL App (1st) 142330 (finding that a the 17-year-old defendant's 45-year sentence was not a *de facto* life sentence unconstitutional under *Miller*); *People v. Jackson*, 2016 IL App (1st) 143025 (finding that a the 16-year-old defendant's 50-year sentence was not a *de facto* life sentence unconstitutional under *Miller*); but see *People v. Buffer*, 2017 IL App (1st) 142931[1] (finding that a the 16-year-old defendant's 50-year sentence was a *de facto* life sentence in violation of *Miller*); *People v. Morris*, 2017 IL App (1st) 141117 (finding that a the 16-year-

[1] This court decided *Buffer* after the parties filed their briefs in this case and we granted defendant's motion to cite *Buffer* as additional authority.

old defendant's 100-year sentence was a *de facto* life sentence in violation of *Miller*); *People v. Ortiz*, 2016 IL App (1st) 133294 (finding that a the 15-year-old defendant's 60-year sentence was a *de facto* life sentence in violation of *Miller*).

¶ 25 In his brief, defendant cites statistics from the Center for Disease Control regarding the life expectancy of individuals his age in support of his contention that his 48-year sentence amounts to a *de facto* life sentence. He also cites sources contending that the life expectancy of prisoners is considerably shorter than individuals who are not imprisoned. In its brief, the State contends that defendant relied on the incorrect data in determining his life expectancy and cites life expectancy statistics that it claims are more recent and more accurate than those cited in defendant's brief. In its reply brief, defendant contends that the State's cited statistics do not account for the shortened life expectancy of prison inmates. None of this evidence was presented at any point before the circuit court.

¶ 26 Similarly, in *Thompson*, on appeal, the defendant relied on the "evolving science" of juvenile maturity and brain development. *Thompson*, 2015 IL 118151, ¶ 18. The court observed that the record contained nothing about how that science applied to defendant's case, the key showing for an as-applied constitutional challenge. *Id.* The court determined that rather than determining these issues for the first time on appeal, "the trial court is the most appropriate tribunal for the type of factual development necessary to adequately address defendant's as-applied challenge in this case." *Id.*

¶ 27 Some panels of this appellate court have accepted defendants' invitations to review life expectancy data in determining whether a sentence represents a *de facto* life sentence. *Buffer*, ¶¶ 57-59 (citing life expectancy for prison inmates data from *People v. Sanders*, 2016 IL App (1st) 121732-B, ¶ 26); *People v. Harris*, 2016 IL App (1st) 141744, ¶¶ 53-54. Other courts, however,

have declined to attempt to determine whether a sentence amounts to a *de facto* life sentence based on defendant's life expectancy. *Jackson*, 2016 IL App (1st) 143025, ¶ 57.

¶ 28 In *Jackson*, one panel of this appellate court stated that:

> "The decision to resentence every similarly situated defendant should not be made at the appellate court level. A finding of prejudice on the ground that defendant's 50-year sentence violated the eighth amendment would both call into question the new sentencing scheme that our legislature just adopted in response to *Miller*, and would prompt a call to resentence every juvenile serving a sentence of 50 years or more.
>
> If an Illinois court was going to hold that a *de facto* life sentence qualifies for consideration under *Miller*, then we would need a consistent and uniform policy on what constitutes a *de facto* life sentence. Is it simply a certain age upon release? If so, is it age 65, as defendant seems to argue for in his appellate brief, or 90? Should the age vary by ethnicity, race or gender? If we are going to consider more than age, what societal factors or health concerns should impact our assessment of a *de facto* life sentence. These are policy considerations that are better handled in a different forum." *Jackson*, 2016 IL App (1st) 143025, ¶¶ 56-57.

In *Buffer*, however, another panel of this court acknowledged "the dilemma in grappling with such complex questions," but chose not to follow the reasoning in *Jackson* and instead relied on the life expectancy data contained in *Sanders* and *Harris* in determining that defendant's sentence amounted to a *de facto* life sentence. *Buffer*, 2017 IL App (1st) 142931, ¶¶ 58-60, 61.

¶ 29 The issue in the case at bar is two-fold. Not only does defendant's challenge ask us to consider an issue that has divided this court, but he raises this issue for the first time on appeal

from the summary dismissal of his postconviction petition.[2] The only evidence in the record concerning the issue of whether defendant's sentence amount to a *de facto* life sentence is defendant's date of birth, his age at the time of the offense, and the length of his sentence. Both parties attempt to supplement that information with their own life expectancy data, but, as discussed, the parties disagree as to which of the suggested data properly reflects defendant's life expectancy. As the supreme court recognized in *Thompson*, "the trial court is the most appropriate tribunal for the type of factual development necessary to adequately address defendant's as-applied challenge in this case." *Thompson*, 2015 IL 118151, ¶ 38.

¶ 30 Where such information is lacking, we agree with holding in *Jackson* that without "a consistent and uniform policy on what constitutes a *de facto* life sentence," the appellate court should refrain from addressing these issues in the first instance.[3] This principle is especially paramount where, as here, defendant raises an as-applied constitutional challenge to the validity of his sentence; a situation where the defendant's specific factual circumstances are necessary to properly address the issue. *Thompson*, 2015 IL 118151, ¶ 38. We therefore adhere to the well-established rule that a claim not raised in a postconviction petition is not reviewable when raised for the first time on appeal. See *People v. (Tramaine) Jones*, 213 Ill. 2d 498, 505 (2004)[4]; *People*

[2] We observe that although defendant's challenge could be framed as a contention that his sentence is void and, therefore, reviewable at any time, the supreme court recently abolished the void sentence rule in *People v. Castleberry*, 2015 IL 116916. See also *People v. Price*, 2016 IL 118613.

[3] Requiring alleged errors to be presented to the trial court creates the opportunity for the parties to develop a factual record, allows the trial court to correct its error, and reduces the burden of an appeal. See *People v. Enoch*, 122 Ill. 2d 176, 185-86 (1988); *People v. Herron*, 215 Ill. 2d 167, 175 (2005).

[4] In *(Tramaine) Jones*, 213 Ill. 2d at 506-07, the supreme court observed that it has, in its discretion, reviewed issues not raised in a postconviction petition for the first time on appeal from the dismissal of that petition. The court noted, however, that the "appellate court [] cannot similarly act. As we have repeatedly stressed, the appellate court does not possess the supervisory powers enjoyed by this court [citations] and cannot, therefore, reach postconviction claims not raised in the initial petition in the manner that we did in cases such as [*People v. Davis*, 156 Ill. 2d 149 (1993)]. *Id.*

v. (Lee) Jones, 211 Ill. 2d 140, 148-149 (2004). Accordingly, we honor defendant's forfeiture of this issue, but remind defendant, as the supreme court pointed out in *(Lee) Jones*:

> "[T]his holding does not leave a postconviction petitioner such as defendant entirely without recourse. A defendant who fails to include an issue in his original or amended postconviction petition, although precluded from raising the issue on appeal from the petition's dismissal, may raise the issue in a successive petition if he can meet the strictures of the 'cause and prejudice test.' " *(Lee) Jones*, 211 Ill. 2d at 148-49.

¶ 31 C. Ineffective Assistance of Postconviction Counsel

¶ 32 Defendant next contends that we should reverse the summary dismissal of his postconviction petition where his counsel provided unreasonable assistance. Defendant contends that his counsel drafted a petition which argued a claim, ineffective assistance of trial counsel, which was barred by both *res judicata* and waiver. Defendant contends that counsel could have avoided these procedural bars by raising a claim of appellate counsel's ineffectiveness for failing to raise a claim of trial counsel's ineffectiveness.

¶ 33 "There is no constitutional right to the assistance of counsel in postconviction proceedings; the right is wholly statutory (see 725 ILCS 5/122-4 (West [2010])), and petitioners are only entitled to the level of assistance provided for by the [Act]." *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). The Act does not provide for appointment of counsel unless an indigent defendant's petition survives the first stage of postconviction proceedings. 725 ILCS 5/122-2.1, 122-4 (West 2010); *People v. Greer*, 212 Ill. 2d 192, 203 (2004). Because the Act does not provide for the right to counsel at the first stage of proceedings, we find no basis to grant petitioners who have the ability to retain counsel the right to reasonable assistance at the first stage of proceedings. *People v. Johnson*, 2017 IL App (4th) 160449, ¶ 36.

¶ 34 We observe that this appellate court has repeatedly rejected claims of ineffective assistance of postconviction counsel for petitions that were dismissed at the first stage of proceedings. See, e.g., *Johnson*, 2017 IL App (4th) 160449, ¶ 36; *People v. Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 27; *People v. Shipp*, 2015 IL App (2d) 131309, ¶¶ 15-16; *People v. Kegel*, 392 Ill. App. 3d 538, 540-41 (2009). Specifically, In *Kegel*, the court found that permitting a petitioner who had the ability to retain private counsel to raise a claim of ineffective assistance after a first-stage dismissal would create a divide between petitioners who could retain counsel and those who could not. *Kegel*, 392 Ill. App. 3d at 541.

> "A prisoner whose retained attorney filed a fatally defective petition would be entitled to reversal of the summary dismissal of the petition if the attorney did not provide 'reasonable assistance.' In contrast, an indigent defendant with no assistance of counsel who filed a petition suffering the same defect would have no basis for reversal. The General Assembly could not have intended such a result." *Id.*

¶ 35 Defendant cites no authority to the contrary, but contends that the supreme court's recent decision in *People v. Cotto*, 2016 IL 119006 and this court's decision in *People v. Anguiano*, 2013 IL App (1st) 113458 create a presumption that a petitioner could raise a cognizable claim of ineffective assistance of postconviction counsel following a first-stage dismissal. We note, however, that both *Cotto* and *Anguiano* considered defendant's claims regarding ineffective assistance of counsel at the second stage of proceedings. *Cotto*, 2016 IL 119006, ¶ 42; *Anguiano*, 2013 IL App (1st) 113458, ¶ 28. In fact, in *Anguiano*, the court noted that "[b]ecause the instant case presents a question of counsel's performance at the second stage, we need not address the first-stage question discussed in *Kegel*." *Anguiano*, 2013 IL App (1st) 113458, ¶ 28.

¶ 36 Moreover, we find defendant's reliance on the language in *Cotto* misplaced. In *Cotto*, the issue before the supreme court was "if every postconviction petitioner represented by counsel is entitled to a reasonable level of assistance from counsel *after first-stage proceedings*, regardless of whether counsel was appointed or privately retained." (Emphasis added.) *Cotto*, 2016 IL 119006, ¶ 1. The court ultimately held that there was no difference between appointed and privately retained counsel in applying the reasonable level of assistance standard to postconviction proceedings "*after a petition is advanced from first-stage proceedings*." (Emphasis added.) *Id.* ¶ 42.

¶ 37 Nonetheless, defendant relies on the language from Cotto that "[t]his court has also required reasonable assistance from privately retained postconviction counsel at the first and second stage of postconviction proceedings." *Cotto*, 2016 IL 119006, ¶ 32. The Third District of this appellate court addressed the supreme court's comment in *Garcia-Rocha*, 2017 IL App (3d) 140754. In that case, the court observed that in making that comment, the supreme court cited to *People v. Mitchell*, 189 Ill. 2d 312 (2000). The *Garcia-Rocha* court distinguished *Mitchell*, observing that in that case, defendant was sentenced to death and prisoners sentenced to death had a statutory right to the assistance of appointed counsel at the first stage of proceedings (725 ILCS 5/122-2.1(a)(1) (West 2010)), unlike the defendant in *Garcia-Rocha* who was sentenced to a term of imprisonment and had no statutory right to counsel at the first stage of proceedings. *Garcia-Rocha*, 2017 IL App (3d) 140754, ¶ 29.

¶ 38 The Fourth District recently indicated its approval of the decision in *Garcia-Rocha* in *Johnson*, 2017 IL App (4th) 160449, ¶¶ 40-41. In that case the court found, citing *Kegal* and *Garcia-Rocha* that: "(1) neither the Act nor case law indicates a prisoner sentenced to a term of imprisonment is entitled to reasonable assistance at the first stage of postconviction proceedings,

(2) to find such an entitlement would require us to judicially disengage the guarantee of reasonable assistance from the underlying right to counsel at second-stage proceedings so that the former can exist independently of the latter, and (3) awarding such an entitlement would lead to disparate treatment among prisoners similarly situated except with regard to the means to obtain counsel." *Id.* ¶ 41. The court further considered the same comment in *Cotto* that defendant relies upon in this case and held that "[w]e further decline to find such an entitlement based on an unclear comment by the supreme court in a case where (1) the court was not tasked with considering the issue; (2) the comment relied on distinguishable precedent; and (3) the court cited, but did not reject, the Second District's holding in *Kegel*." *Id.* We agree with the well-reasoned decisions of our other appellate court districts and hold that defendant is not entitled to reasonable assistance at the first stage of postconviction proceedings where he was sentenced to a term of imprisonment rather than death and reject defendant's arguments based on such an entitlement.

¶ 39 D. Meaningful Access to Courts

¶ 40 Defendant finally contends that we should reverse the summary dismissal of his petition where he was denied his constitutional right to access the courts because of counsel's alleged ineffectiveness. Defendant maintains that because counsel failed to include a cognizable and non-procedurally defaulted claim in his petition, his opportunity to show a substantial denial of his constitutional rights was "cut short."

¶ 41 In support of his contention, defendant relies on *People v. Love*, 312 Ill. App. 3d 424 (2000). In *Love*, defendant was convicted of home invasion and filed a direct appeal. *Id.* at 425. This court affirmed defendant's conviction and defendant subsequently filed a postconviction petition, which was denied by the trial court and that denial was affirmed by the appellate court.

Id. Defendant then filed a *pro se* motion for DNA testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 6/116-3 (West 1998)) and motion for the appointment of counsel. *Id.* Counsel filed an amended section 116-3 motion "that basically restated the allegations in defendant's original motion." *Id.* Counsel conceded at a hearing on the motion that the blood defendant wished to be tested no longer existed and the court denied the motion on that basis. *Id.* at 426; *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 17. Defendant appealed, contending that his counsel was ineffective for conceding that the blood was no longer available. *Love*, 312 Ill. App. 3d at 426. On appeal, the court found that defendant was not entitled to counsel because the plain language of section 116-3 does not provide a right to counsel. *Id.* at 426-27. The court further found that defendant's right of meaningful access to the courts was fulfilled when the trial court appointed counsel for him. *Id.* at 427.

¶ 42 In the case at bar, defendant contends that even though he was represented by counsel in this his case, his right of meaningful access to the courts was denied because his postconviction counsel raised a procedurally deficient claim. We fail to see how *Love* supports defendant's claim. Although we recognize that "it is now established beyond a reasonable doubt that prisoners have a constitutional right of access to the courts (*People v. Alcozer*, 241 Ill. 2d 248, 260 (2011) (quoting *Bounds v. Smith*, 430 U.S. 817, 821 (1977)), as discussed, *supra*, a postconviction petitioner does not have a right to counsel at the first stage of proceedings. "[B]ecause defendant had no right to counsel, the appointment of counsel did not carry with it a right to a particular level of assistance of counsel." *Love*, 312 Ill. 3d at 427. Defendant was not denied the opportunity to present his claims, irrespective of their merit, which is all the meaningful access required. See *Lewis v. Casey*, 518 U.S. 343, 354 (1996). Therefore, the circuit court's order must stand.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.